

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish
Policies and Rules to Ensure Reliable, Long-Term
Supplies of Natural Gas to California.

Rulemaking 04-01-025
(Filed January 22, 2004)

ASSIGNED COMMISSIONERS' RULING REGARDING MOTION

Summary

On August 18, 2004, Ratepayers for Affordable Clean Energy (RACE) submitted for filing a motion "for a determination of applicability of the California Environmental Quality Act [CEQA] to the Phase I Draft Decision."¹ Several parties to this rulemaking submitted responses in opposition to RACE's motion.

Today's ruling denies RACE's motion.

Background

RACE's motion at page 1 states that the motion was "submitted pursuant to CPUC Rules 45, 17.1 and 17.2." Rules 17.1 and 17.2 of the Rules of Practice and Procedure address the procedures for filing a motion for determining whether a proceeding involves a project subject to or exempt from CEQA.² Rule 45 addresses motion practice except as otherwise provided elsewhere in the Rules or by statute. Since RACE's motion is for a determination of whether

¹ As of today's ruling, RACE's motion has not been filed with the Docket Office because RACE failed to include a certificate of service and a service list with its submission. (See Rule 3 of the Commission's Rules of Practice and Procedure.)

² The CEQA statutes are contained in Public Resources Code §21000 and following.

CEQA applies to the Phase I decision, responses to RACE's motion were due on August 30, 2004 in accordance with Rule 17.1(e)(4).³

Timely responses to RACE's motion were submitted by Pacific Gas and Electric Company (PG&E), Sound Energy Solutions (SES), and by San Diego Gas & Electric Company and Southern California Gas Company (SDG&E/SoCalGas).

Position of RACE

RACE contends that the Phase I draft decision⁴ constitutes a "project" within the meaning of CEQA, which triggers the need for an environmental impact report (EIR). In support of its motion, RACE cites several decisions which discuss when environmental consequences must be considered.

RACE asserts that "because the CPUC's rulemaking will inevitably result in infrastructure construction activities, as well as the extraction, transport, and ultimate use of additional LNG in California, the rulemaking itself can be said to ultimately 'culminate in physical impacts to the environment.' "(RACE Motion, p. 4.)

RACE also contends that the Commission cannot avoid CEQA review by "improperly breaking up the larger project into separate phases or approvals,

³ RACE states at page 2 of its motion that: "We look forward to your response within ten days as provided by Rule 17.1(e)(4)." This statement, and the addressing of the motion to the assigned administrative law judges, suggests that RACE expects a ruling on the motion "within ten days." However, the "10 calendar days" referenced in Rule 17.1(e)(4) only establishes the time in which parties have to respond to RACE's motion, and does not require a ruling within ten days of the motion.

⁴ The Phase I draft decision was adopted by the Commission at its September 2, 2004 meeting.

and claim that the current phase or rulemaking has no environmental effect.”
(RACE Motion, p. 5.)

Position of the Respondents

All of the parties who submitted a response oppose RACE’s motion for a determination that CEQA applies to the Phase I decision and recommend that the motion be denied.

PG&E and SDG&E/SoCalGas contend that neither this rulemaking nor the decision fall within the provisions of CEQA because neither are “projects” within the meaning of CEQA.

SES also asserts that the Phase I decision is not a project subject to CEQA. SES contends that RACE’s motion ignores the exemption in the CEQA guidelines which states that a project does not include continuing administrative or maintenance activities such as general policy and procedure making, which is what this rulemaking is about. According to SES, the Phase I decision only “sets forth general policies and procedures for regulating the natural gas industry in California,” and will not result “in the construction of any LNG import facilities without other significant discretionary decisions and orders at a future time.”
(SES Response, pp. 3-4.)

Discussion

CEQA applies to state and local agencies, and requires that they consider the environmental consequences of a project subject to their discretionary approval. These environmental consequences are typically considered in the form of a Negative Declaration or an EIR. The action by the state or local agency is subject to the requirements of CEQA if it fits within the definition of a “project” and is not subject to a statutory or categorical exemption.

The CEQA guidelines, found in §15000 and following of Title 14 of the California Code of Regulations, are used to help agencies and the public to interpret the CEQA statutes. Section 15061(b)(3) of the CEQA guidelines provides that a project is exempt from CEQA if:

“The activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.”

A “project” is defined in Public Resources Code § 21065 as “an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is ... [a]n activity directly undertaken by any public agency.” (Public Resources Code § 21065.)⁵

RACE’s motion contains rhetoric regarding the impact of ensuring reliable long-term supplies of gas to California, but sidesteps the fact that CEQA requires that the agency action must involve a project. Contrary to what RACE would lead one to believe, the Phase I decision does not authorize the construction of any LNG facility, pipeline or backbone transmission. The decision specifically states:

“[W]e point out that we are not deciding in this decision whether certain proposed LNG projects should be built in California or on the West Coast. Instead, today’s decision is only addressing what needs to be in place for potential sources of LNG supply to connect to the gas transmission and distribution systems of the California gas utilities. (Phase I Decision.)

⁵ Section 15378 of the CEQA guidelines contains a similar definition of a project.

The policy directives in the Phase I decision merely allow interconnections to the existing gas utilities' transmission systems. The decision does not authorize the construction of any LNG facilities or the pipelines needed to connect the LNG facilities to the interconnections.

If one looks closely at the proposed LNG projects, it is clear that the environmental concerns that RACE has raised are being addressed in other forums. For example, the Baja California LNG projects are being handled through the regulatory processes of Mexico, the proposed facilities offshore of California are subject to federal review, and the Port of Long Beach has initiated an environmental review of the proposed LNG project in Long Beach.

Unlike the cases cited by RACE, the decision does not authorize any action which constitutes an essential step that will lead to a physical or indirect change to the environment. (*See Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified School District* (1992) 9 Cal.App.4th 464, 474.) Rather, the decision is only addressing the manner in which the gas utilities will allow potential interconnections to occur. As SDG&E/SoCalGas point out at page 5 of their response, the "causal link" between the decision and any future LNG or pipeline facility construction is missing. Also, the potential interconnections with LNG facilities may or may not materialize, which does not fulfill the "foreseeable" impact requirement that a project must meet before CEQA applies.

Thus, since there is no specific project being approved in the Phase I decision, CEQA does not apply at this juncture. RACE's motion for a determination that CEQA applies to the Phase I decision, or to this proceeding, is denied.

IT IS RULED that the motion by the Ratepayers for Affordable Clean Energy for a determination of the applicability of the California Environmental Quality Act to the Phase I decision, or to this rulemaking, is denied.

Dated September 3, 2004 at San Francisco, California.

/s/ MICHAEL R. PEEVEY

Michael R. Peevey
Assigned Commissioner

/s/ SUSAN P. KENNEDY

Susan P. Kennedy
Assigned Commissioner

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Assigned Commissioner's Ruling Regarding on all parties of record in this proceeding or their attorneys of record.

Dated September 3, 2004, at San Francisco, California.

/s/ JANET V. ALVIAR

Janet V. Alviar

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.